Nos. 9994 and 9995

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CITIZEN-NEWS COMPANY, A CORPORATION, RESPONDENT

ON PETITIONS FOR THE ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

These cases are before the Court upon petitions filed by the National Labor Relations Board for the enforcement of separate orders issued by it, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*), against The Citizen-News Company, a corporation. This Court has jurisdiction of the proceedings under Section 10 (e) of the Act. The unfair labor practices here involved occurred in the State of California within this judicial circuit.

The pertinent provisions of the Act are set out in the appendix to this brief, *infra*, p. 32.

STATEMENT OF THE CASE[1]

Proceedings before the Board

Upon proceedings had pursuant to Section 10 of the Act[2] the Board, on March 26, 1940, issued its decision and order in a case known upon the Board's records as No. C–947[3] and upon the records of this Court as No. 9994 (A. R. 123–146). Upon further proceedings[4] the Board, on July 16, 1941, issued its decision, in a case known upon the Board's records as No. C–1790[5] and upon the records of this Court as No. 9995 (R. 83–114).

The findings of fact, conclusions of law and orders may be briefly summarized as follows:

1. *Nature of respondent's business.*—Respondent, a California corporation, having its principal office and place of business at Hollywood, California, is engaged

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[1] By stipulation and upon order of the Court, No. 9994 and No. 9995 have been consolidated. References to the record in No. 9994 are designated by the symbol "A. R."; those in No. 9995 by the symbol "R."

[2] These included charges and amended charges filed by the Los Angeles Newspaper Guild (herein called the Guild): complaint of the Board (A. R. 1–10); answer of respondent (A. R. 10–28); hearing before a Trial Examiner of the Board; Intermediate Report of the Trial Examiner (A. R. 29–87) and exceptions to the Intermediate Report by the Guild and respondent (A. R. 87–122). Oral argument before the Board was requested and granted but only the Guild appeared at the scheduled hearing.

[3] 21 N. L. R. B. 1112.

[4] These included charges and amended charges filed by the Guild; complaint (R. 1–8); answer (R. 9–21); hearing before the Trial Examiner; Intermediate Report of the Trial Examiner (R. 22–47) and exceptions thereto (R. 47–82). Oral argument before the Board was requested and granted but only the Guild appeared at the scheduled hearing.

[5] 33 N. L. R. B., No. 100.

in the publication of a daily newspaper, the Hollywood Citizen-News, as well as in job printing for commercial establishments and other newspapers (A. R. 169–171).[6] The extra-state circulation of the Citizen-News totals one-half of one percent of the approximately 26,000 copies distributed (A. R. 171–173, 220–221). The paper uses approximately 350 tons of newsprint per month, which is shipped from British Columbia, Canada; its cost constitutes 20 percent of all of respondent's expenses and 10 percent of the cost of publishing the Citizen-News (A. R. 198–202, 214–220). Over 21 percent of the printed matter in the paper consists of items transmitted from outside the state to the Citizen-News which has at its plant teletype machines maintained by the Associated Press, of which it is a member, and of the United Press, to which it subscribes (A. R. 172–181, 188–191, 228). It also subscribes to numerous syndicated services which supply materials originating outside the State, which make up 17 percent of the reading matter of the paper (A. R. 191–194, 228). In addition, national advertising provides 10 percent of the total advertising revenue of the paper and over 5 percent of respondent's total revenue (A. R. 197, 222).

2. *Unfair labor practices.*—In No. 9994 the Board found that from 1936 to 1938 respondent repeatedly interfered with, restrained, and coerced its employees in the exercise of their rights in violation of Section 8

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[6] In No. 9995 respondent admitted in substance, in its answer and at the hearing, the jurisdictional facts alleged in the complaint (R. 2–3, 9, 132–133). The references below to the record in No. 9994 are given to support the Board's jurisdictional findings in that case.

(1) of the Act by criticizing and disparaging the Guild, criticizing the use of outside negotiators, attempting to secure contracts with employees' committees in its various departments, threatening to cut the wages of the employees who failed to sign such contracts, and threatening to discharge employees if a contract with the Guild was consummated (A. R. 128–135).[7] In No. 9995, the Board found that after the Guild had called a strike of its members in May 1938 because of a current labor dispute over the alleged discriminatory discharges and refusal to bargain, respondent again interfered with, restrained, and coerced its employees in violation of Section 8 (1) by depriving those who had been out on strike of their by-lines because of their participation in the strike and by anti-union statements made by three of its supervisory employees (R. 90–93); the Board further found that by discharging one of its employees, Leonard Lugoff, on March 30, 1940, respondent discriminated in regard to his hire and tenure of employment, in violation of Section 8 (3) and (1) of the Act (R. 93–105).[8]

3. *The Board's orders.*—The orders of the Board require respondent to cease and desist from the unfair labor practices found, to offer reinstatement with back

[7] The Board dismissed the complaint in this case insofar as it alleged that respondent had discriminated against another employee, Karl Schlichter, in violation of Section 8 (3) (R. 105–109, 114).

[8] The Board dismissed the complaint in this case insofar as it alleged that respondent had discriminated against four employees in violation of Section 8 (3) of the Act and refused to bargain with the Guild in violation of Section 8 (5) of the Act (A. R. 135–143, 145).

pay to Leonard Lugoff, to restore to the strikers the by-lines of which they were deprived following the strike, and to post appropriate notices (A. R. 145–146; R. 112–114).

SUMMARY OF ARGUMENT

I. Upon the undisputed facts the National Labor Relations Act is applicable to respondent.

II. The Board's findings of fact are fully supported by substantial evidence. Upon the facts so found, respondent has violated Sections 8 (1) and (3) of the Act.

III. The Board's orders are valid and proper under the Act.

ARGUMENT

POINT I

Upon the undisputed facts, the National Labor Relations Act is applicable to respondent

The Board's findings with respect to the business of respondent (*supra,* pp. 2–3) are based upon undisputed evidence (A. R. 166, 168–231, R. 2–3, 9, 132–133). They clearly establish the Board's jurisdiction under the holding of this Court in *National Labor Relations Board* v. *Star Publishing Co.,* 97 F. (2d) 465, on very similar facts. See also *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Hearst,* 102 F. (2d) 658 (C. C. A. 9); *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *National Labor Relations Board* v. *Newark Morning Ledger Co.,* 120 F. (2d) 262 (C. C. A. 3), cert. denied

62 S. Ct. 363; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4).

Point II

The Board's findings that respondent violated section 8 (1) and (3) of the act are supported by substantial evidence

A. Respondent's unfair labor practices in violation of section 8 (1) prior to the strike[9]

1. Manifestation of hostility to the Guild and interference in its internal affairs

The first collective activity on the part of the employees here involved occurred in July 1936, prior to the commencement of organization by the Guild, when a group of editorial employees requested a pay increase from Judge Harlan G. Palmer, respondent's president (A. R. 261–263, 393–394). Instead of dealing with them collectively, Palmer arranged individual conferences with them at which he discussed their work in general terms but made no reference to the requested wage increases (A. R. 234, 263–264). This initial attempt at collective efforts having been forestalled, Palmer announced his attitude toward the type of activity which had been attempted in a statement in an issue of "Office Gossip," the mimeographed paper which was distributed to the employees with their pay checks. He informed the employees that grievances about salaries and working conditions should be lodged with department heads, that they would receive "earnest consideration," but that if grievances were disallowed and the employees remained dissatisfied, they should seek em-

[9] The unfair labor practices discussed under this head were the basis for the Board's findings in No. 9994.

ployment elsewhere (A. R. 265–271, 394). Harwood Young, the paper's business manager, further clarified Palmer's attitude toward the collective efforts of the employees by telling Roger Johnson, an editorial staff employee who complained to him about the ineffectiveness of the conferences, that Judge Palmer was "adverse to taking action under suggestions from pressure groups" (A. R. 243).

In the fall of 1936, the Los Angeles and Citizen-News chapters of the American Newspaper Guild were organized (A. R. 235–238, 271–272). Respondent's officials thereafter made it clear, by disparaging remarks about the Guild, that the Citizen-News looked upon the Guild's organization with even less approval than it had upon the employees' unaffiliated collective efforts.[10] Managing Editor Swisher, for instance, told James Crow, an editorial employee, that "it was bad strategy for the Guild to talk so much about wages and hours" and that it might better talk of "professional standards" (A. R. 396). Swisher also said that he did not see what the Guild had accomplished for its members in its activities elsewhere in the country (A. R. 397). Assistant Business Manager Wynn questioned Roger Johnson about the Guild and told him that "he wondered if the Guild was not paying too much atten-

[10] The supervisory status of Managing Editor Swisher, Assistant Business Manager Wynn, and Display Advertising Manager Brandon, whose activities are discussed herein, was not denied either in the pleadings or at the hearing, and respondent is unquestionably answerable for their activities. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79, 80; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520, 521.

tion to the economic rather than the ethical phases" (A. R. 246). Display Advertising Manager Brandon told an employee, Karl Schlichter, that he would be ashamed to belong to an organization which accepted such a settlement as the Guild had procured in a labor dispute in the East (A. R. 282).

Further disparagement and disapproval of the Guild by respondent's supervisory employees was manifested when that organization decided to affiliate with the C. I. O. in June 1937. Swisher questioned the propriety of the affiliation in a conversation with Johnson (A. R. 247); at about the same time he told a number of editorial workers that "the C. I. O. was carrying things too far" (A. R. 391). Brandon, too, discussed with Johnson the disadvantages of unions for "people of the professional class" (A. R. 249).

Brandon's attack on the Guild likewise took more concrete form. He turned the regular meetings of the display advertising men, held almost every morning (A. R. 278, 374), into a forum for denouncing the Guild to the men in the department under his supervision. According to undenied testimony, Brandon reiterated at these meetings the distinction between "white collar workers" and laborers, stating that "white collar workers were caught in the middle between business and laboring people, and that one of these days the white collar workers, like us, are going to get ourselves some guns and shoot those union bastards" (A. R. 278–279). The entire period of these meetings was so frequently spent in discussing unions that at least one employee felt that "there was a definite program of attack on the union" (A. R. 278).

We submit that this campaign of interference in the internal operations of the Guild, of disparagement of its activities, and of belittlement of the advantages which it would secure to its members, was of an unmistakably coercive and hence illegal character. The appeal to the employees as office workers on the ground that they were "professionals" who had no need for organization carried both an indication of management disapproval of Guild membership and an appeal to the employees as a group apart from and superior to industrial workers for whom alone labor organizations were impliedly intended. It cannot be contended that the instant employees, because of the nature of their work, were any less than normally "sensitive and responsive to even the most subtle expression on the part of [their] employer" *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3). The white-collar worker, paid no more than the industrial worker, is fully as dependent as the latter on the whim of his employer and as completely subject to his economic control.[11]

The facts described above show that, from the very inception of Guild activities among its employees, respondent evidenced an "earnest effort and plan to pre-

[11] It has been contended, in a proceeding under the New York Labor Relations Act, that white-collar workers—insurance agents—were not entitled to the benefits of that legislation. The Court of Appeals of New York rejected the argument, holding that "the purposes and policy * * * approved [in that act] and the scheme of the act as a whole dispelled all doubt that these agents * * * are employees * * * and entitled to the benefits of the Act." *Metropolitan Life Insurance Co.* v. *New York State Labor Relations Board*, 20 N. E. (2d) 390, 394.

vent unionization of [its] employees." *Montgomery Ward & Co., Inc.* v. *National Labor Relations Board,* 107 F. (2d) 555, 559 (C. C. A. 7). The activities of Palmer, Young, Swisher, and Brandon, were clearly designed to interfere with and discourage their subordinates in their collective undertakings. They constituted an intrusion into a domain foreclosed to the employer under the Act and as such were a violation of Section 8 (1).[12]

Despite his frequently expressed objections to the Guild, Brandon attempted to become a member of that union in October 1937 and asked Roger Johnson to help him (A. R. 252–253). When the Guild members, however, refused to admit him, fearing that he was engaged in an attempt to dominate the organization and his subordinates, the display advertising men, in particular (A. R. 281, 407), Brandon retaliated by insisting that the display men under him report for work on Saturdays thereafter, which they had not previously been required to do (A. R. 375, 408–409). When they protested that there was little work to be done on Sat-

[12] *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. (2d) 153, 177 (C. C. A. 9); *National Labor Relations Board* v. *Luzuray, Inc.,* 123 F. (2d) 106, 107–108 (C. C. A. 2); *National Labor Relations Board* v. *Moench Tanning Co.,* 121 F. (2d) 951, 952 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 870 (C. C. A. 2); *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. (2d) 474, 478–479 (C. C. A. 5); *National Labor Relations Board* v. *Tex-O-Kan Flour,* 122 F. (2d) 433 (C. C. A. 5); *Singer Manufacturing Co.* v. *National Labor Relations Board,* 119 F. (2d) 131, 133 (C. C. A. 7); *Colorado Fuel and Iron Corp.* v. *National Labor Relations Board,* 121 F. (2d) 165, 174 (C. C. A. 10).

urdays, he told them angrily that they could "come Saturday mornings and sit at your desk, keep looking at your desk and smell your own feet stink" (A. R. 375).[13] The penalty was clearly imposed to retaliate against the employees for an action taken by them to protect their collective activity in the Guild; as such, it constituted a threat to their freedom of activity as members of that organization.[14]

The Guild's national convention of June 1937 voted to present to its members the question of the admission of non-editorial employees to its ranks (A. R. 247–248). The officials of the Citizen-News thereupon started questioning the employees as to whether this would result in the organization of respondent's business departments. Managing Editor Swisher, who had asked a number of the editorial employees whether they were Guild members (A. R. 391), discussed the Guild's plans with Johnson and asked Johnson directly whether the Guild was organizing respondent's business department (A. R. 247). This new manifestation of petitioner's concern with the activities of its employees was likewise illegal. It has uniformly been held that interrogation about union membership and the internal workings of a union must

[13] Brandon was not called as a witness by respondent to deny this testimony or to explain his conduct.

[14] The imposition of discriminatory working conditions upon employees for their activities in a union has been recognized as violative of the Act. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 251; *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. (2d) 658, 660 (C. C. A. 2); *Kansas City Power and Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 348–349 (C. C. A. 8).

be proscribed if the free right to organize is to be guaranteed.[15]

2. ~~Petitioner's~~ Respondent's attempt to ignore the Guild and bargain with committees of its employees

Late in June 1937, respondent asked the employees in the several departments of the Citizen-News to form committees to discuss wages, working conditions, and grievances with Judge Palmer (A. R. 249, 272, 399), and submitted proposals on these subjects to the various committees which were formed (A. R. 250). Although the committee representing the employees in the business departments entered into a contract with respondent (A. R. 381, 398), the editorial and classified advertising departments' committees refused to do so (A. R. 273, 384, 399–400). Their refusal was met with attacks upon the Guild which clearly revealed the purpose of Palmer's maneuver. When the editorial department's committee told Palmer that it could not deal with him directly, since that would be violative of the Guild's constitution, Palmer replied angrily, "What is the matter with you people? Don't you know what you want? Can't you make up your own minds? Do you prefer to have someone in Washington or New York or some place else dictate to you? Can't you decide for yourselves? Would you prefer to be

[15] *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 337; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 75; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9); *Texarkana Bus Company, Inc.* v. *National Labor Relations Board*, 119 F. (2d) 480, 483 (C. C. A. 8).

dictated to by some stranger miles away from you?" (A. R. 273–274). The refusal of the classified advertising employees to sign the proffered contract and their insistence upon being represented by the Guild similarly prompted Business Manager Young to threaten that their department would be affected first if they did not sign the agreement and it became necessary to cut salaries (A. R. 383–385). Young also expressed his objection to non-employee negotiators when he said that using them would "put Judge Palmer in the position of the less reputable publishers" (A. R. 398). Brandon similarly stated that the workers did not understand what they were doing in having "outside negotiators and agitators" come in and work for them (A. R. 451).

Petitioner's explosion of resentment at the failure of its plan serves to underline its manifest purpose. The Board properly noted that (A. R. 133):

> Thus, while in 1936 the respondent discouraged collective activity, in 1937 after the appearance of the Guild it encouraged the formation of bargaining committees and sought contractual relations with them. It is apparent that the respondent altered its policy of dealing with its employees in order to head off the organizational campaign of the Guild.

The Board's further conclusion that the strategy utilized was illegal (A. R. 135) was entirely proper. A similar attempt to execute contracts directly with employee committees and thus prevent the designation of an outside representative which would prove objectionable to the management has been condemned by the

Supreme Court in *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 359–360.[16] Furthermore, respondent's openly expressed opposition to dealing with non-employee negotiating agents was a plain restraint upon the right of the employees to select their own bargaining representative (see cases cited *supra,* pp. 9–10).

3. Respondent's illegal conduct during bargaining negotiations with the Guild

Between December 22, 1937, and May 13, 1938, respondent held a series of bargaining conferences with the Guild (A. R. 283–354). Although the Board dismissed charges in the complaint that respondent's conduct during that period constituted a violation of Section 8 (5) (A. R. 136), it nevertheless held that certain concurrent activities of respondent's supervisors were in violation of Section 8 (1) (A. R. 135), in that they

> * * * were plainly calculated to destroy the prestige of the Guild and inculcate in the minds of the employees the fear that the efforts of their representatives would be profitless (A. R. 134).

After one of the conferences with the Guild negotiators, Managing Editor Swisher remarked to an employee, Selby Calkins, who had been present as an observer, that the "speed up" and "stretch out" did not appear to be bothering him (A. R. 456). Failing

[16] See also *National Labor Relations Board* v. *Vincennes Steel Corporation,* 117 F. (2d) 169, 171–173 (C. C. A. 7); *National Labor Relations Board* v. *Superior Tanning Co.,* 117 F. (2d) 881, 890–892 (C. C. A. 7); cf. *F. W. Woolworth Co.* v. *National Labor Relations Board,* 121 F. (2d) 658, 660 (C. C. A. 2); and cases cited *infra,* p. 16, note 17.

to understand the reference, Calkins asked Swisher to explain it; the editor replied that he referred to a discussion which had occurred during a bargaining conference, and attempted to discuss the negotiations until Calkins requested him not to do so (A. R. 456–457). Subsequently Swisher tried to discuss the negotiations with other employees individually outside the bargaining conferences (A. R. 460–461, 485). Business Manager Young warned Karl Schlichter, one of his subordinates, that the proposals sought by the Guild would force the management to get rid of some employees (A. R. 375–376).

These attempts by respondent's officials to discuss the subject matter of the negotiations with employees who were Guild members show that respondent had not abandoned its aim to arrive at an arrangement with its employees which excluded the Guild, and that in pursuing that aim, respondent was willing to engage in conduct totally incompatible with the kind of bargaining through designated representatives which the Act seeks to guarantee. Bargaining on an equal plane clearly cannot be had while the authority of the representatives whom the employees have designated is undermined by direct communication away from the bargaining table between agents of the employer and their subordinates. Although by this conduct respondent's officials may well have been performing "acts which, normally, could be validly done," such actions are clearly prohibited by the Act where, as this Court has held of a comparable situation, they serve to interfere with, restrain, and coerce employees in the exercise of their rights. *National Labor Relations Board* v.

Grower-Shipper Vegetable Association, 122 F. (2d) 368, 376–377.[17]

4. Conclusion as to respondent's activities before the strike

The facts and authorities set forth above show that respondent's entire approach to the collective activity of its employees fell short of the statutory standard. Its supervisors' disparaging remarks about the Guild and the C. I. O. (*supra,* pp. 6–10), their interrogation of the employees about their membership in the Guild and its plans for organizing the paper's business employees (*supra,* pp. 11–12), Brandon's punishment of his subordinates for their refusal to admit him to membership in their union (*supra,* pp. 10–11), and, finally, Palmer's efforts to deal with the employees directly and thereby head off the necessity of dealing with the Guild as their representative (*supra,* pp. 12–16), constituted independent violations of Section 8 (1), which fall into categories which have been frequently recognized by the Board and the Courts. The Board's finding (A. R. 135) that throughout this period respondent repeatedly violated Section 8 (1) of the Act is fully supported.

B. The strike and its settlement

On May 13, 1938, the Guild and respondent reached an agreement on a contract, subject to acceptance by the Guild members (A. R. 342–354). Before the Guild

[17] See also *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 100 (C. C. A. 2); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223–224 (C. C. A. 3), cert. den., 311 U. S. 705; *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7).

acted, however, respondent discharged five employees (A. R. 357–358). Thereupon the Guild called a strike which commenced on May 17 (R. 359, 365). Charges of unfair labor practices were filed and a complaint was issued by the Board in No. 9994 on June 27, 1938, which alleged that respondent had violated Section 8 (1), (3), and (5) of the Act (A. R. 1–9). After a hearing had been held on this complaint, respondent and the Guild, on July 30, 1938, entered into a strike settlement which provided, *inter alia,* for execution of the contract which had previously been tentatively agreed upon (R. 17–21, 618–626).

By the terms of the settlement respondent also agreed to reinstate the discharged employees as well as the strikers (R. 18) and the Guild agreed: "in the event it is finally determined that the five discharged employees, or any of them, were lawfully discharged, those so affected by such determination shall promptly resign or be subject to discharge." (R. 19.) The settlement further provided that by "final determination" was meant "either the acceptance by both sides of the determination by the National Labor Relations Board or the final determination by any court or courts to which any of the parties to such proceedings may turn the matter." (R. 19.)

On March 19, 1940, the Board handed down its decision in No. 9994, wherein it found that respondent had interfered with, restrained, and coerced its employees by the acts described above (*supra,* pp. 6–16) in violation of Section 8 (1), but that the discharged employees had been legally dismissed for business rea-

sons and that respondent had not refused to bargain collectively with the Guild; accordingly the complaint was dismissed insofar as it alleged violations of Section 8 (3) and (5) of the Act (A. R. 128–143).

C. Respondent's unfair labor practices after the strike [18]

Harmonious relations between the management and the employees of the Citizen-News did not, unfortunately, follow either the strike settlement agreement or the issuance of the Board's order in No. 9994. Respondent continued, as we shall see, to evince its hostility to the collective activity of its employees. In addition, when the Board announced its decision in No. 9994 in March 1940, respondent went beyond the terms of the strike settlement and ousted not only the employees whose discharges had been upheld by the Board but also an additional employee who had refused to follow the leadership of the Guild during the strike but had thereafter rejoined its ranks and become extremely active in its behalf (*infra,* pp. 21–29).

1. Respondent's continued manifestation of hostility to the Guild in violation of Section 8 (1) of the act

When respondent's employees returned after the strike they were almost at once met with the imposition of a discriminatory working condition, established because of their legitimate concerted activity. The editorial employees, whose names had previously appeared on articles which they had written, were denied these "by-lines" after the strike (R. 420). Managing Editor Swisher justified this change of policy on the ground

[18] The unfair labor practices discussed here are the basis for the Board's findings in No. 9995.

that ill will created during the strike had made it difficult for certain readers, particularly advertisers, to see the names of former strikers without becoming alarmed (R. 421). The use of the by-line is regarded by the newspaper man as an honor; as one employee testified, "it is a part of the professional pride of a newspaper man to have his name on a story" (R. 420–421). Respondent's denial of this privilege thus constituted a penalty which could not legally be imposed because of collective activity. (See cases cited *supra*, p. 11, note 14).

The alleged pressure from its advertisers did not justify respondent's discrimination against its union employees. The Act contains no exemptions because the employer may be of the view that the circumstances with which he is confronted will justify its disregard, *Wilson & Co., Inc.* v. *National Labor Relations Board*, 123 F. (2d) 411, 417 (C. C. A. 8).[19] Moreover the situation here is not that of an employer who faces certain economic loss if he adheres to the law. All that appears is that respondent heard that some of its advertisers found that mention of the names of strikers was distasteful. No threat of economic pressure is shown

[19] See also *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 792 (C. C. A. 9), cert. denied, 312 U. S. 678; *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, 482 (C. C. A. 5), cert. denied, 313 U. S. 582; *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331, 335 (C. C. A. 6); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), cert. denied, 313 U. S. 565; *National Labor Relations Board* v. *Moore-Lowry Flour Mills*, 122 F. (2d) 419 (C. C. A. 10).

to have been conveyed. The Act cannot be set aside merely because an employer chooses to please his customers.

After the strike, respondent's officials continued to make disparaging statements about the Guild not unlike those which were found to constitute a violation of the Act in No. 9994 (*supra,* pp. 6–10). Patricia Killoran, a former striker, was criticized for her striking activities by several of her superiors. When on one occasion she was explaining her failure to cover an assignment, Business Manager Young replied: "How could I believe anything after all the things that you have done?" (R. 356). When Killoran charged that Young was referring to her Guild activities, he said: "Well, as a matter of fact, I can't talk about those things because I am not allowed to" (R. 356). He nevertheless went on to say that his brother had been a very active union man, that he knew more about unions than she ever would; that he knew about good unions, but that in view of what the Guild had done, she could not be trusted (R. 356). After the strike, Managing Editor Swisher also remarked to Killoran that the Guild was not a reputable organization (R. 384). Herbert Sternberg, respondent's advertising manager, vehemently criticized Killoran's Guild activity shortly after the strike, telling her what a fool she was and how bad the C. I. O., the Guild, and the strikers were (R. 403). Young, Swisher, and Sternberg were not called upon to deny Killoran's testimony, which clearly shows, as the Board found (R. 93), continued interference, restraint, and coercion on the part of respondent.

2. The discriminatory discharge of Leonard Lugoff

By the discriminatory discharge of Leonard Lugoff on March 30, 1940, respondent displayed its hostility toward the Guild in more concrete form. Lugoff was an advertising solicitor who had worked for the Citizen-News from November 1931 to September 1932 and from January 1934 until his discharge in March 1940. He had previously been employed by other Hollywood newspapers in the same capacity (R. 181-185). He joined the Guild in October 1937, but when he failed to respond to the 1938 strike call, he was expelled by that organization (R. 187).

In August 1938, before going on his vacation, Lugoff considered borrowing some money. Because his sales had dropped during the strike, he asked his superior, respondent's classified advertising manager, Tobin, whether there was any doubt about his job being continued (R. 188). Tobin assured him that there was nothing to worry about and Lugoff proceeded to make the loan (R. 188, 551). Nevertheless, on August 19, 1938, he was discharged by Tobin purportedly because of his low sales production record (R. 179, 188, 428). Lugoff complained to Tobin that the latter had misled him, and, on August 22, 1938, he carried his appeal to Judge Palmer, informing him that he had contracted the debt in reliance upon Tobin's statement that his position was secure. He also told Palmer that he had given up his membership in the Guild (R. 189-190, 197).[20] Palmer consulted with Business Manager

[20] Palmer's conflicting version of this conversation is discussed below (pp. 25–26).

Young, who thereafter sought out Lugoff where he was waiting in the plant and handed him a notice of reinstatement which read as follows (R. 191–194):

HOLLYWOOD CITIZEN-NEWS,
August 22, 1938.

To: Mr. Lugoff
Subject:

You will be retained in your present position, with final decision to be made on January 1, 1939. The intervening period will be probationary.

T. H. YOUNG,
Business Manager.

The specified period and an additional 15 months passed without any word to Lugoff that his probation had not been satisfactory (R. 194, 286–287); it is, therefore, clear that the "final decision" reached on January 1 was to retain him as an employee.

In February 1939, Lugoff again joined the Guild, which at that time had only one other member in the classified advertising department (R. 194–195). He undertook the organization of respondent's business employees, a project, it will be recalled, in which the management had shown great interest from the time when the Guild first opened its doors to them (*supra*, pp. 11–12). Thus, in May he attempted to persuade them to sign a petition authorizing the Guild to represent them although not requiring them to become members (R. 195–197, 261, 263–264, 411–414). In June 1939, he proposed to Business Manager Young the establishment of a guaranteed weekly wage for the classified advertising employees (R. 197–199, 287). On this occasion Lugoff told Young that in his opinion "unions usually came in [sic]existence because of dissatisfaction among em-

ployees about working conditions and wages," and succeeded in procuring Young's permission to submit a recommendation for a guaranteed wage; such a guarantee was established by Young soon afterward (R. 288, 293, 339–341). From July 19, 1939, until the time of his discharge Lugoff frequently attended conferences with respondent's officials as a member of a Guild committee (R. 213, 225, 323). His militance in behalf of that organization was conspicuously displayed in August when he engaged in an argument with another employee whom he charged with spreading a rumor that the management was going to close down the plant if the Guild were not reasonable in its negotiations for a new contract (R. 216–220, 314–320). George Palmer, classified credit manager, who is the nephew of Judge Palmer and the son of one of respondent's owners, was present during this dispute, and intervened to remark that he knew that the rumor was true and was "willing to gamble on it" (R. 218–219, 225). Shortly before his discharge, in March 1940, Lugoff circulated another petition, this time not only among employees whom he thought to be sympathetic toward the Guild, but among practically all those in the classified advertising department (R. 226–229, 329–331).

On March 26, 1940, the Board's decision in No. 9994 was issued, finding that the employees named in the complaint had not been discriminated against (*supra,* pp. 17–18; A. R. 136–143; R. 581–582); accordingly, on March 30, those who remained in respondent's employ were discharged under the terms of the strike settlement agreement (*supra,* p. 17, R. 142–145). On the same day, Lugoff received a special delivery letter dis-

charging him on the ground that his production did not justify his employment (R. 146–148, 236).[21]

Lugoff's activities in organizing the classified advertising employees were known to respondent.[22] His open circulation of the petition in May 1939 had admittedly come to Tobin's attention (R. 359, 411–412, 479–480, 511). In view of respondent's outspoken aversion to the Guild (*supra,* pp. 18–20) and Lugoff's conspicuous activities in its behalf, only a satisfactory showing that the discharge was prompted by legal considerations could overcome the clear implication that respondent had seized upon the dismissal of the other employees under the terms of the strike settlement agreement as an opportunity for ridding itself of an ardent supporter of the Guild. Respondent, we submit, has made no such satisfactory showing.

Respondent gives two primary reasons for Lugoff's discharge: first, that he was reinstated after his discharge in 1938 on the same conditions as were the employees who were reinstated pursuant to the strike

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[21] The letter read, in full, as follows (R. 148):

> DEAR MR. LUGOFF:
>
> This notice is to terminate your services with us effective this day. Your production does not justify your employment.
>
> Yours very truly,
>
> *Publisher.*

[22] When Judge Palmer was asked at the hearing whether he knew that Lugoff was a member of the Guild at the time of his discharge, he replied, "I had reason to believe that Mr. Lugoff was a member of the Guild * * * because I had seen Mr. Lugoff attending a Guild meeting" (R. 146).

settlement agreement (R. 143–145) (*supra,* p. 17), and second, that his services had not proved satisfactory after his reinstatement (R. 148).

The first of these grounds rests on Palmer's testimony about his conversation with Lugoff at the time of his reinstatement in 1938. Palmer testified that Lugoff had protested his discharge in 1938 not on the ground that he had contracted a loan (*supra,* p. 21), but on the ground that it was unfair to reinstate strikers and yet to dismiss a man who had remained on the job (R. 142–145, 162). According to his version, he consulted with Young and agreed that Lugoff should be given equal consideration with the strikers (R. 143). The Board rejected this testimony as inconsistent with the available facts (R. 96–99).

Palmer's explanation does not account for the fact that the letter given to Lugoff when he was reinstated in 1938 makes no mention of the strike settlement, and recites that Lugoff's "probationary" period is to terminate on January 1, 1939, rather than on the date of the Board's anticipated decision. Respondent's attempt to alter the terms of this written instrument by an alleged additional oral condition, providing that if the discharged employees were not reinstated by the Board he, too, was to go, is thus extremely unpersuasive. Furthermore, Palmer admitted that he never took the natural step of conveying the alleged condition upon his reinstatement to Lugoff (R. 144), and the testimony of Young, who apprised Lugoff of his reinstatement by handing him the letter described above, shows that nothing was said about the alleged condition at that time (R. 343). Thus the condition

was imposed, if at all, by an undisclosed and unilateral act. The document, on the other hand, is fully consistent with Lugoff's testimony that he did not even know the terms of the strike settlement agreement (R. 285), but had placed his protest solely upon the debt which he had incurred, and that reinstatement had been granted him for this reason after Judge Palmer had given him the choice of getting his job back or having the Company pay the loan (R. 190–191).

Likewise inconsistent with Palmer's testimony and wholly consistent with that of Lugoff is the fact that the letter informing Lugoff of his discharge in 1940 cites only Lugoff's production record and makes no mention of the recently issued decision of the Board (*supra,* p. 24). Finally, Tobin admitted that before his discharge Lugoff had mentioned the prospective loan and sought reassurance that his job was secure (R. 427–429, 515). It is conceded that Lugoff in fact did make the loan (R. 551). Thus the surrounding admitted facts all support Lugoff's version.

In sum, respondent's first ground for the discharge is wholly discredited by the record and was properly rejected by the Board (R. 99). Indeed, Judge Palmer, at the hearing, insisted that notwithstanding the alleged condition subjecting his reinstatement to the terms of the strike settlement agreement, Lugoff would have been retained if his work had not proved unsatisfactory (R. 583–584). Hence, it is upon his purportedly unsatisfactory services after his reinstatement in 1938 that respondent relies as its real motive for dismissing him along with the reinstated employees. To this second asserted offense we now turn.

It should be noted at the outset that Lugoff's "probationary" period, as announced in the letter given to him in 1938 (*supra*, p. 22), expired on January 1, 1939. Respondent failed to indicate at the end of that period that Lugoff's performance was not satisfactory; accordingly, his employment returned to its original basis. At no time between his reinstatement in 1938 and his discharge in 1940 was his efficiency questioned (R. 194, 286–287). It was not until 15 months later that respondent again raised the question of inefficiency, and then its specifications of that charge rested almost exclusively on events of two years or more earlier. This resurrection of grievances which, if they had any basis, had long been condoned, points strongly to the conclusion that respondent was advancing pretexts to conceal its true motives for the discharge.[23]

Lugoff's sales production was second highest among respondent's four outside salesmen at the time of his discharge (R. 201–209, 299, 476–477, 509–510). Respondent nevertheless contends that his production was inadequate and points to the fact that his sales decreased more pronouncedly from 1937 to 1939 than did those of the other salesmen (R. 467–468, 477). The decrease in Lugoff's production, however, which occurred

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[23] See *National Labor Relations Board* v. *Arcade Sunshine Co.*, 118 F. (2d) 49, 51 (App. D. C.), cert. denied, 313 U. S. 567; *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. (2d) 291, 292–293 (C. C. A. 4); *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 154 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. (2d) 144, 147 (C. C. A. 7), cert. denied, 311 U. S. 704; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8).

early in the spring of 1938, was fully explained; it did not result from his inefficiency but from the loss of three accounts, two of which moved outside his territory (R. 594–596).[24]

The further contention that Lugoff was discharged because he failed to make the minimum guaranteed wage of $24 a week which his collective efforts had succeeded in having established (*supra,* pp. 22–23) cannot reflect a serious reason for dismissing him. He received the lowest pay rate of any of the outside salesmen and since its establishment in July, 1939, he, as well as other employees, had frequently failed to make the guarantee (R. 199–200, 213, 485–486, cf. 341–342). Lugoff denied that he had been warned that he would be required to equal the guaranteed salary with his commissions (R. 200, 213, 294) and the Board credited his denial (R. 103). Indeed, the purpose of establishing the guarantee was to secure a minimum wage notwithstanding the production of the salesmen.[25]

In short, respondent's explanation of its discharge of Lugoff is entirely unconvincing. No extensive citation

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[24] Respondent makes a further effort to support its charge of inefficiency against Lugoff on the ground that one Sellers, an inexperienced salesman who succeeded him, soon equalled his advertising sales (R. 240, 460–465). But the unpersuasiveness of this argument is established by Tobin's own testimony that experience is not an important factor in selling advertising (R. 519–520). Sellers' sales did not exceed those of Lugoff, which they would have done had Lugoff been lax in his work, as claimed (R. 457).

[25] Respondent advances several additional miscellaneous grounds for discharging Lugoff, to wit, failure to call on clients and gambling and sleeping during working hours. These claims do not find support in the record as the true reasons for his dis-

of cases is necessary to show that the Board could properly reject that explanation and deduce the true motive from respondent's hostility to the Guild and Lugoff's renewed activity on behalf of that organization.[26] As the Circuit Court of Appeals for the Fourth Circuit has held, the Board is not required, merely because a salesman's production has fallen, to accept an employer's reliance on that fact as a defense to a charge of discrimination, particularly where, as here, even his lowered production equalled that of other employees similarly situated: *National Labor Relations Board* v. *Schmidt Baking Co.*, 122 F. (2d) 162, 164. The Board's conclusion that Lugoff was in fact discharged for organizational activities which were objectionable to respondent has ample support in the evidence.

Point II

The Board's orders are valid and proper under the act

The orders of the Board require respondent to cease and desist from the unfair labor practices found, to

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charge (cf. R. 211, 221–222, 309–314, 341, 430, 526). This is particularly true in view of the fact that all these supposed misdeeds occurred and were known to respondent's officials long before the discharge (R. 447, 527).

[26] *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 326–333; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 602. The Courts consistently look with suspicion upon allegations of inefficiency made for the first time after employees have aroused the hostility of their superiors by becoming active in behalf of a union. See *National Labor Relations Board* v. *Torrea Packing Co.*, 111 F. (2d) 626, 629 (C. C. A. 9), cert. denied, 311 U. S. 668; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 154 (C. C. A. 5); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 544 (C. C. A. 10).

reinstate Lugoff with back pay, to restore to the strikers the by-lines of which they were deprived, and to post notices (A. R. 145, R. 112–114). These requirements are the appropriate ones to remedy the unfair labor practices found. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 600; *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780 (C. C. A. 9).

The varied and continued violations of Section 8 (1) which are the essence of these cases demand that respondent be required to cease and desist from "in any other manner interfering with, coercing, or restraining its employees." The propriety of this form of the order where the facts disclose such "a course of * * * conduct in the past" as constitutes a "threat of continuing and varying efforts" to interfere with the employees' organizational rights was established in *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426, at pp. 437, 438.[27] The language is peculiarly appropriate here, where the "course of conduct" continued after the commencement of the first proceeding against respondent and culminated, after the Board had ordered respondent to cease and desist

[27] See also *National Labor Relations Board* v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780, 789 (C. C. A. 9); *National Labor Relations Board* v. *Grower-Shipper Vegetable Assn.,* 122 F. (2d) 368 (C. C. A. 9); *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 661 (C. C. A. 9); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 890–891 (C. C. A. 1, cert. denied, 313 U. S. 595); *Woolworth Co.* v. *National Labor Relations Board,* 121 F. (2d) 658 (C. C. A. 2); *National Labor Relations Board* v. *Air Associates, Inc.,* 121

from its illegal practices in a "discriminatory discharge * * * [which] goes to the very heart of the Act." *National Labor Relations Board* v. *Entwhistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its orders are valid and proper, and that a decree should issue affirming and enforcing the orders as requested in the Board's petitions for enforcement.

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F. (2d) 586 (C. C. A. 2); *Oughton* v. *National Labor Relations Board* (opinion sur settlement of decree), April 4, 1941 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co.*, *ibid.* (C. C. A. 3); *National Labor Relations Board* v. *Pilling*, *ibid.* (C. C. A. 3); *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60 (C. C. A. 4); *National Labor Relations Board* v. *Reynolds Wire Co.*, 121 F. (2d) 627 (C. C. A. 7); *Bethlehem Steel Corp.* v. *National Labor Relations Board*, 120 F. (2d) 641 (App. D. C.).

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V. Sec. 15 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

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